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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 71

BEKINS MOVING & STORAGE COMPANY, *Petitioner*,

v.

DONALD JOHNSON, *Respondent*.

On Petition for Writ of Certiorari to the Supreme Court of the State of Idaho

REPLY OF PETITIONER TO MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

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The memorandum filed in this proceeding on behalf of the Interstate Commerce Commission compounds the confusion and uncertainty in the law created by the Idaho Supreme Court decision and emphasizes the necessity for action by this Court. The basic rate structure of the entire household goods carrier in-

dustry, consisting of more than 2,400 motor carriers holding certificates of public convenience and necessity from the Interstate Commerce Commission, is constructed upon the released rate orders of the Commission, issued in accordance with section 20(11) of the Interstate Commerce Act. The Idaho Supreme Court, on its own initiative and without prior referral to the Interstate Commerce Commission, has taken upon itself to create an "exception" to the provisions of the released rate order issued to the household goods carriers by the Commission. The Commission acknowledges that the "exception" is novel, that it was created by the Idaho Court and not by the Commission, and that if the "exception" were to be extended by other courts in the future, the Commission would then step in and put a stop to the matter. In other words, the Commission is saying that the Idaho Supreme Court has only slightly invaded the territory exclusively assigned to the Interstate Commerce Commission by Congress, but if the invasion becomes serious, then the Commission will take appropriate action. In this attitude, the Commission is shirking its responsibility. The time to rout out a malignancy is at its inception, and not when it has multiplied to the point where it is about to destroy the organism.

The Commission does not disagree with the legal principles asserted in the Petition for Certiorari. In fact, at page 5 of its Memorandum, the Commission states:

> "It is, moreover, clear that limitation-of-liability clauses apply to accessorial services such as packing in a barrel. See *Cleveland, C.C. & St. L. R. Co.* v. *Dettlebach*, 239 U.S. 588. The Commission would regard with greatest concern any decision

> authorizing some form of collateral agreement departing from the limitation-of-liability provisions authorized by the motor carrier's tariff or the released rate order."

Thus, the Commission would not have tolerated a voluntary payment by Bekins to Mr. Johnson of the value of his hi-fi set, because such payment would have been a form of collateral agreement between the carrier and the shipper departing from the specific limitation of liability in the tariff and the Commission's released rate order. But the Commission apparently is willing to compromise its position if a State Court condones such a departure from the terms of the tariff and the released rate order.

The decision of the Idaho Supreme Court recognizes the existence of the limitation of liability provisions in the carrier's tariff and the Commission's released rate order, but it creates an exception thereto by stating that those provisions apply only to misfeasance and not to nonfeasance. The Commission, at page 7 of its Memorandum, refers to ". . . the very narrow exception created below . . .", thereby acknowledging, as petitioner contends, that *such exception never existed until it was created by the Idaho Supreme Court in this proceeding.* If the Idaho court is to be permitted to create exceptions to orders of the Interstate Commerce Commission, then every other State court presumably would have the same right, and the inevitable result would be to undermine a basic purpose of the Interstate Commerce Act—that of preserving uniformity of treatment of all shippers by all carriers engaged in interstate commerce.

The Commission argues in its Memorandum (pp. 6-7), that except where "the interest of a uniform and

expert administration of the regulatory scheme laid down by the Act" is required, State Courts are permitted to interpret the provisions of carrier tariffs if the question presented "does not differ from those presented when the construction of any other document is in dispute." *What more fundamental and significant a matter requiring uniform and expert interpretation can be presented than the scope and effect of the Commission's own released rate order issued under the provisions of Section 20(11) of the Interstate Commerce Act, upon which the entire structure of household goods carrier rates is based?*

As to the substance of the exception to the limitation of liability provisions of the Commission's released rate order and the carrier's tariff, which the Idaho Supreme Court has created, that exception states that the limitation applies only to misfeasance and not to nonfeasance, i.e., that it applies only to negligent performance and not to negligent failure to perform.[1]

The Commission's released rate order does not make this distinction between misfeasance and nonfeasance; the carrier's tariffs do not make this distinction; and the statute, in authorizing released rate orders, makes no such distinction. This Court itself, in construing the scope of Section 20(11) of the Interstate Commerce Act, which section authorizes the Commission to

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[1] In Footnote 2 of the Commission's Memorandum, cases are cited in which full rather than limited liability has been allowed because of wrongful conversion or gross or wanton negligence on the part of the carrier. Here the finding of fact is that the carrier was guilty of simple negligence in failing to place the hi-fi set in a barrel in the course of loading the entire contents of Mr. Johnson's home into a moving van.—Pet. p. 22a. This was a matter of simple oversight by the men doing the loading rather than wantonness.

issue released rate orders, has stated that the statutory provision is all inclusive (*Southeastern Express Co.* v. *Pastime Amusement Co.*, 299 U.S. 28 at 29):

> "The words of the statute are 'broad enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination.' ".

In this case the carrier failed to discharge its undertaking to place the hi-fi set in a barrel. The Commission fully agrees that its released rate order applies not only to the transportation service itself but also to accessorial services such as packing items in a barrel (Memo. p. 5), with the result that a failure to perform an accessorial service has the same legal consequences as a failure to perform the transportation itself. Thus, under the exception created by the Idaho Court decision, if any item of household goods in the shipment should be lost, stolen or destroyed during the course of the loading and prior to the actual transportation, the carrier would be guilty of a nonfeasance, rather than a misfeasance, with respect to its contract to transport such item to destination, and it would thereby be subjected to full liability for such item, rather than the limited liability for which the shipper contracted.

The released rate order of the Commission is the foundation upon which the entire rate structure of the household goods carriers is built. The Supreme Court of Idaho, on its own initiative, and without prior referral of the issue to the Interstate Commerce Commission, has taken upon itself to undermine that whole rate structure by stating that the released rate order of the Commission applies only to misfeasance and

not to nonfeasance. The particular factual situation upon which the Idaho Court relies is a narrow one, but the principle announced by that Court, if it is permitted to stand, will find application in countless other situations. *If the doctrine of primary jurisdiction has any meaning whatsoever, certainly interpretation of the scope and effect of a basic order of the Commission underlying the entire structure of carrier rates is a matter within the primary jurisdiction of the Commission.*

If the Interstate Commerce Commission intends that an exception, however narrow, be made to an outstanding released rate order which it has issued, and upon which the carriers have long relied in constructing their rates, such exception should be made in the course of a proceeding before the Commission in which due process has been followed, and not simply by the Commission defaulting when a State court usurps the Commission's prerogative and itself amends the Commission's order.

Petitioner respectfully submits that now, as a result of the completely incongruous position taken by the Commission, the need is even greater for this Court to grant certiorari and resolve for the household goods

carrier industry the dilemma created by the Idaho Supreme Court decision.

Respectfully submitted,

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